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Supreme Court, U.S.
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No. 10-285

IN THE

Supreme Court of the United States

CNG FINANCIAL CORPORATION,

Petitioner,

v.

ALLEN L. DAVIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not contest that a split exists on whether the presumption of arbitrability applies to questions of contractual interpretation about which parties can enforce an arbitration agreement. The decision below confirms Ohio's stance as a jurisdiction (along with the First, Fifth, Seventh, and Eighth Circuits) that refuses to apply the presumption to contracts that are ambiguous about who may compel arbitration. These courts reject this Court's holding that the presumption applies whenever "a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2851 (2010). Respondent also does not dispute that the Second, Fourth, and Eleventh Circuits correctly hold that questions about who can enforce a valid arbitration agreement go to the scope of the agreement, not its existence. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (the presumption applies where "the problem at hand is the construction of the contract language itself"). Those courts therefore apply the presumption to questions of contractual interpretation about both what may be arbitrated and who may arbitrate.

Petitioner is not asking the Court to revisit the principle that arbitration is a matter of contract. Nor that arbitration agreements should be enforced according to their terms. Petitioner is asking this Court to accept *certiorari* and eliminate the artificial distinction that some courts have created between the application of the presumption to contractual interpretations regarding parties and issues.

Respondent does not question the importance of this issue or doubt that this Court should resolve it. His only argument in opposition is that the arbitration agreement unambiguously "excludes Petitioner from the list of parties entitled to invoke the [arbitration] provision." (Br. in Opp. at i). *But there is no such list.* The agreement defines the subject-matters that must be arbitrated, but *not* which signatories may enforce arbitration. The agreement is simple: if the shareholders "dispute any matter arising out of or relating to this Agreement" and they cannot resolve it via negotiation, then "the controversy will be settled by arbitration."

Like the court below, Respondent relies on inference to answer the question of whether Petitioner, a signatory, can compel arbitration when sued on claims disputed by the shareholders because of ambiguity inherent in the agreement. But the FAA requires that such ambiguities be resolved by the presumption in favor of arbitration. *Volt Info. Sciences, Inc. v. Bd. of Trs.*, 489 U.S. 468, 475-76 (1989) ("in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act . . . ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration").

Respondent engages in sleight-of-hand by arguing that Petitioner is not named in the negotiation provisions. In the close corporation context, this point makes no sense, particularly as the corporation is directly referenced in other parts of the arbitration clause. Matters that shareholders dispute will inevitably ensnare the corporation. Moreover, it was *Respondent* that chose to bypass negotiation and file

suit on claims that should have been brought in arbitration.

This case demonstrates the problems inherent in refusing to apply the presumption to questions about a signatory's ability to compel arbitration. Respondent obtained an injunction prohibiting the shareholders from holding shareholders' meetings or from receiving dividends, matters clearly "disputed" by the other shareholders. Yet the court below denied arbitration because it found an ambiguity about whether Petitioner could compel arbitration – and it construed that ambiguity *against* arbitrability. Respondent thus effectively obtained relief against the other shareholders, but escaped arbitration by suing only the company. And he even now tacitly concedes that the matters in this suit are "disputed" by the other shareholders – his only claim is that Petitioner cannot invoke arbitration. Such a result is anathema to the FAA.

The lower court's decision denying Petitioner the ability to compel arbitration was only possible because the court disregarded this Court's precedent. The court of appeals recognized an ambiguity in the agreement, but resolved it against arbitration:

> By specifically naming only some of the parties to the agreement, the parties ***implied*** their desire to exclude all others not named. The doctrine expressio unius est exclusio alterius 'justif[ies] the ***inference*** that items not mentioned were excluded by deliberate choice, not inadvertence.'

Pet. App. 5a (emphasis added). By relying on canons of construction and inferences, the court acknowledged an ambiguity in the agreement. That the Ohio court was joining four Circuits in this

refusal to construe ambiguities regarding parties gives this Court ample reason to grant *certiorari* and reverse. (*See* Pet. at 13-15).

This unwillingness to construe an ambiguity in favor of arbitration contravenes the principle that the presumption applies where the issue "is the construction of the contract language itself." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Very recently, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2850 (2010), concluded that the presumption applies "where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand."

Though there are legal doctrines that prevent signatories from avoiding arbitration by suing the wrong party,[1] all such principles ultimately depend upon the interpretation of the arbitration agreement. If a cleverly drafted pleading can put the issue of *who* can enforce arbitration at issue, a party seeking to avoid arbitration can avoid application of the presumption in many jurisdictions. This Court should step in and clarify that the presumption of arbitrability applies to *all* questions of contractual interpretation about the scope of an arbitration agreement.[2]

This Court will soon decide the strength of the federal policy favoring arbitration when measured

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[1] *See, e.g., Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993).

[2] The interpretation of the "arising out of" language used in this arbitration agreement is the subject of another petition for certiorari. *See American Home Assurance Co. v. UMG Recordings, Inc.* (No. 10-428).

against opposing state laws in *AT&T Mobility LLC v. Concepcion* (No. 09-893). This case similarly gauges the force of the federal presumption of arbitrability when pitted against default interpretive rules under state law. This Court should accept *certiorari* and affirm its holdings in *Moses H. Cone,* 460 U.S. at 24-25, and *Granite Rock*, 130 S. Ct. at 2850, by eliminating the distinction between "issues" and "parties" that divides federal and state courts. Holding that the presumption applies to any question of contractual interpretation regarding the scope of a valid, enforceable arbitration agreement will significantly strengthen parties' abilities to rely on the agreements that they sign.

CONCLUSION

For the foregoing reasons, Petitioner CNG Financial Corporation respectfully requests that this Court grant its petition for a writ of *certiorari*.

Respectfully submitted,

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